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No. 816

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IN THE

Supreme Court of the United States

October Term, 1957

THE NEW YORKER MAGAZINE, INC.,

Appellant,

—v.—

LAWRENCE E. GEROSA, as Comptroller of the City of New York, and GEORGE M. BRAGALINI, as Treasurer of the City of New York,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

REPLY TO APPELLEES' MOTION TO DISMISS

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The Motion to Dismiss, while it contains a few inaccuracies to which this reply is addressed, leaves unimpaired the demonstration that this case poses substantial issues calling for review by this Court. Like the courts below, the appellees rely mechanically upon *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, neither disputing nor coping with the extensive record of facts showing how widely the interstate preparation, printing, publication and circulation of this appellant's national magazine (like those of the *amici*) differ from the essentially local publication in that case. Similarly, avoiding the problem in a one-sentence invocation of *Western Live Stock* (Motion, p. 17), the appellees do not even attempt to answer our showing (Statement as to Jurisdiction, pp. 9, 14, 18) that

the appellant's delivery of its advertisers' messages across state and national boundaries is constitutionally indistinguishable from the transmission of such messages by radio for which gross receipts were held non-taxable in *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650.

While the basis for this Court's exercise of its jurisdiction seems clear, the Motion to Dismiss tends to obscure or misstate the issues in a few respects. We submit this brief reply to eliminate any possibility of misunderstanding the undisputed facts, the issues, and the relevant precedents involved in this appeal.

1. Distinguishing *Western Live Stock*, we have reviewed the extensive and uncontested facts revealing that substantial amounts of out-of-state property and activities, and extensive travel and communication interstate, are essential to appellant's interstate and international delivery of its advertisers' messages (Statement as to Jurisdiction, pp. 4-8, 11-13, 20-21). Without questioning, but overlooking, many of these facts, the appellees focus upon appellant's admitted activities in New York and assert (Motion, p. 12) that the magazine is "published" in New York.

The important point, of course, is that appellant's substantial and undenied out-of-state and interstate property and activities make it impossible to view "the preparation, printing and publication of the advertising matter" in this case as being the kind of local, intrastate operation the Court ruled upon in *Western Live Stock* (see 303 U. S. at 260). Where the New Yorker is "published" is a question with a variety of possible answers. In the dictionary sense of "print", "issue from the press" or "put into general circulation" Webster's *New International Dictionary*, 2d ed., 1949)—undoubtedly the sense used in *Western Live Stock*—the magazine is "published" in Connecticut, where it is printed and whence the copies are mailed or shipped.

The crucial distinctions from *Western Live Stock* here are (a) that an identifiable portion of appellant's advertising receipts—that attributable to the excess of the entire edition over the city edition rate—would never be contracted for by the advertisers but for the demonstrated extent and quality of appellant's interstate and foreign circulation, and (b) that the interstate portion of appellant's advertising receipts which we claim New York City cannot constitutionally tax is earned solely by the circulation to readers in other states and abroad of advertising in magazines printed in Connecticut, and mailed from the Greenwich, Connecticut, post office or shipped from Connecticut by railway express or truck.* This complex of commerce facts—interstate printing, preparation, and delivery—renders *Western Live Stock* inapposite and brings this case within the protection laid down in cases like *Fisher's Blend* and *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434.

2. As to the latter case, *Gwin, White & Prince*, the appellees treat it (Motion, p. 16) as involving "selling produce in other states and foreign countries," and urge on this ground that it affects only appellant's circulation receipts, not the advertising receipts here involved. It bears mention, therefore, that *Gwin*, precisely like this case, involved the interstate rendition of a service. The taxpayer there was a "marketing agent" arranging for the sale of the products of fruit growers, not selling its own. 305 U. S. at 435-436. It was for this "service" that the taxpayer was paid (*id.* at 437); it was these payments which this Court held non-taxable because the tax "reach[ed] the

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* As noted by the court below (Statement as to Jurisdiction, p. 28), the "completed magazine is mailed or shipped from Connecticut"—a fact which is only partially described when appellees observe (Motion, p. 13) that "the printer mails some of the copies" from Connecticut.

entire interstate commerce *service* rendered both within and without the state and burden[ed] the commerce in direct proportion to its volume" (*id.* at 438, emphasis added). Our point here is that the rule should be no different with respect to appellant's "interstate commerce service" of printing, publishing and distributing advertisements to a particular class of readers. And see *Fisher's Blend, supra,* 297 U. S. at 656.

3. The appellees urge as an argument for dismissing the appeal (Motion, pp. 13, 16) that there is no problem of a multiple burden here. They argue that other states could not levy a tax like the City's on appellant's advertising receipts and that cases like *Fisher's Blend* and *Gwin, White & Prince* are distinguishable on this ground. The argument misconceives both the unquestioned facts of this case and the import of this Court's decisions on the subject.

As we have shown (Statement as to Jurisdiction, p. 19), if the City's tax has been validly applied here, the appellant is exposed to the possibility of similar taxation in Connecticut and states where it has sales offices, where its salesmen solicit advertising, and where the magazine is sold at newsstands. Moreover, as *Western Live Stock* itself demonstrates, the pertinent theory of "multiple burdens" is applicable even where the potential tax in other states is a tax of a different kind on a different taxpayer—and even where such additional tax is invalid. Analyzing the forbidden tax on radio advertising receipts in *Fisher's Blend,* this Court pointed out in *Western Live Stock* that the vice of multiple taxation in the former case existed because "[i]f broadcasting could be taxed, so also could reception." 303 U. S. at 260.

It is clear, of course, that the tax on reception would not have fallen on the broadcasting taxpayer in *Fisher's Blend.*

It is significant, too, that the case this Court cited on this radio situation in the passage just quoted from *Western Live Stock* was a decision of a three-judge court declaring *invalid* a tax on the owners of receiving sets. *Station WBT, Inc.* v. *Poulnot*, 46 F. 2d 671 (E. D. S. C.). These points bear reemphasis in the light of appellees' misinterpretation of this Court's pronouncements on the multiple burden problem.

It should be mentioned, furthermore, apart from the ample showing of a potential multiple burden in the circumstances of this case, that such a showing is by no means necessary to the invalidation of a tax which, like the one in this case, directly burdens interstate commerce. *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433 (New York City gross receipts tax held invalid as to taxpayer all of whose property and activities were in New York City); *Freeman* v. *Hewit*, 329 U. S. 249, 256-57.

4. Tacitly acknowledging the fact that appellant's advertising service is the only interstate business which the City taxes in full, while all others receive substantial exemptions for out-of-state activities (Statement as to Jurisdiction, p. 25), appellees suggest (Motion, p. 17) that "appellant appears to concede" that this pattern is required under the Federal Constitution. There is certainly no such concession. Our argument, more fully detailed in the Statement as to Jurisdiction (pp. 15-16, 22-26), is that:

(a) The ruling in *Western Live Stock* followed *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459. Read together, these cases show that if a tax could reach in full the gross receipts from appellant's advertising service, it should reach at least equally the full receipts of manufacturers shipping their products in interstate commerce. Thus, by granting an allocation to manufacturers, and justifying this

under the commerce clause, the City has demonstrated that its tax differs from the one in *Western Live Stock* just as it differs from the one in *American Manufacturing*. This demonstration requires reversal of the decision below wholly aside from the factual differences which distinguish this case from *Western Live Stock*.

(b) Additionally, we urge that, apart from the commerce point, the variety of exemptions and allocations for all interstate businesses other than appellant's effects a deliberate and systematic discrimination offensive to the due process and equal protection clauses.

In these arguments that the tax violates the Constitution there is surely no suggestion that appellees are "required" by the Constitution to reach the determinations appellant attacks. Indeed, the most immediately apprehended point in this case is that national magazine advertising has been singled out for a unique tax burden which at once transgresses the commerce clause and discriminates arbitrarily in favor of other businesses which are factually and constitutionally indistinguishable.

CONCLUSION

It is respectfully submitted that the motion to dismiss should be denied and that the Court should note probable jurisdiction of the appeal.

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